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ABSTRACT

Perspectives on the Bakke Supreme Court decision are considered. It is claimed that some of the distortions in the public perception of the Bakke case are the responsibility of the media coverage. Although the Court said that race may be a factor in the admissions process, many people, with the effect of headlines of "Bakke Wins," think otherwise. A concern is whether corporate and educational officials will use the ambiguities of the Bakke decision to weaken or even abandon their affirmative action commitments. It is suggested that affirmative action programs have come about only because of insistent pressures of black people and their allies, and only because sufficient pressure was brought to enact laws and compliance mechanisms mandating black participation in American institutional life. It is proposed that the merit system was invoked to keep blacks out, on the basis of test scores and grade averages, but that the system could find room for C students who play football or are born into the family of a wealthy alumnus. It is further proposed that even a merit system based solely on test scores is inadequate as a selection mechanism, because tests have not been devised that can accurately predict future success. The challenge for individuals and institutions to overcome the pervasive discrimination of the past, and to ensure black educational opportunity and the moral integrity of higher education institutions is noted. (SW)

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FROM DISCRIMINATION TO AFFIRMATIVE ACTION

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AT
INVITATIONAL REGIONAL SEMINAR:
"BAKKE AND BEYOND"
NEW YORK CITY
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FROM DISCRIMINATION TO AFFIRMATIVE ACTION

I MUST ADMIT THAT WHEN I READ THE TENTATIVE PROGRAM FOR THIS SEMINAR MY EYE WAS CAUGHT BY SOMETHING CALLED "BAKKE SLIDE SHOW." BUT I READ IT QUICKLY, AND WHAT REGISTERED IN MY MIND WAS: "BAKKE SIDE SHOW."

PSYCHOLOGISTS TELL US THAT SIMPLE MISTAKES ARE NEVER JUST SIMPLE; THEY REVEAL SOMETHING ABOUT OUR ATTITUDES. AND IT WAS PERFECTLY NATURAL FOR ME TO READ THAT LINE OF TYPE AS "BAKKE SIDE SHOW," BECAUSE THAT IS INDEED WHAT THE BAKKE CASE BECAME, AND CONTINUES TO BE — A CIRCUS SIDE SHOW DIVERTING US FROM THE REAL ISSUES OF HOW TO MAKE OUR SOCIETY MORE JUST AND MORE EQUAL.

FROM THE BEGINNING, THE BAKKE CASE WAS LOADED WITH THE FREIGHT OF SCARE WORDS AND MISINFORMATION. "REVERSE DISCRIMINATION" HAS BECOME A COMMONLY ACCEPTED PHRASE, DESPITE THE FACT THAT 99 AND NINE-TENTHS PERCENT OF ALL DISCRIMINATION IN AMERICA TODAY IS BY NO STRETCH OF THE IMAGINATION, "REVERSE."

SOME OF THE DISTORTIONS IN THE PUBLIC PERCEPTION OF THE BAKKE CASE ARE CLEARLY THE RESPONSIBILITY OF THE MEDIA. THE MEDIA PERSONALIZED THE CASE FROM THE BEGINNING, FOCUSING ON BAKKE HIMSELF, INSTEAD OF ON THE ISSUES INVOLVED. WEEKS BEFORE THE SUPREME COURT'S DECISION WAS ANNOUNCED, FRED FRIENDLY WROTE AN OP ED PAGE ARTICLE FOR THE NEW YORK TIMES SUGGESTING THAT THE COURT GIVE ADVANCE NOTICE WHEN COMPLEX CASE DECISIONS ARE TO BE HANDED DOWN, SO THAT THE MEDIA COULD BETTER PREPARE THEMSELVES. WELL, THE DECISION DATE WAS A SUBJECT OF RUMOR FOR WEEKS — THE PRESS HAD PLENTY OF TIME. AND THE RESULT WAS A CONTINUATION OF SENSATIONALIZED STORIES AND MISLEADING HEADLINES SUCH AS "BAKKE WINS."

NONE OF THIS WOULD BE ESPECIALLY IMPORTANT, EXCEPT FOR STUDENTS OF JOURNALISM, IF IT WERE NOT FOR THE FACT THAT THE MOST IMPORTANT ELEMENT IN THE BAKKKE CASE IS THE WAY PEOPLE PERCEIVE IT. IT IS NOT WHAT THE COURT SAID THAT WILL AFFECT BLACK YOUNG PEOPLE TRYING TO ENTER COLLEGE, BUT WHAT PEOPLE <u>THINK</u> THE COURT SAID.

AND THAT, IN TURN, HINGES ON WHAT THEY WANT TO THINK. WE OFTEN HEAR WHAT WE WANT TO HEAR; WE OFTEN PERCEIVE THINGS IN WAYS WE WISH THEY WERE.

SO ALTHOUGH THE COURT SAID THAT RACE MAY BE A FACTOR IN THE ADMISSIONS PROCESS, MANY PEOPLE, WITH THOSE HEADLINES OF "BAKKE WINS" STILL IN THEIR HEADS, THINK OTHERWISE.

THAT KIND OF PUBLIC CONFUSION IS DANGEROUS. THE FACT IS THAT THE COURT, IN EFFECT, UPHELD MOST, PERHAPS 90 PERCENT, OF AFFIRMATIVE ACTION PROGRAMS NOW IN EXISTENCE. AND EVEN THOSE UNDER A SHADOW CAN EASILY BE BROUGHT TO CONFORMITY WITH THE COURT'S READING OF THE CONSTITUTION.

THE REAL QUESTION IS WHETHER THEY WILL BE. THE REAL PROBLEM IN THE WAKE OF <u>BAKKE</u> IS WHETHER CORPORATE AND EDUCATIONAL OFFICIALS WILL SEIZE ON THE AMBIGUITIES OF THE <u>BAKKE</u> DECISION TO WEAKEN OR EVEN ABANDON THEIR AFFIRMATIVE ACTION COMMITMENTS.

IT WOULD BE NAIVE TO SUPPOSE THAT AFFIRMATIVE ACTION IS AN ENTIRELY VOLUNTARY RESPONSE TO INCLUDE PEOPLE ONCE EXCLUDED. QUITE THE CONTRARY! AFFIRMATIVE ACTION PROGRAMS HAVE COME ABOUT ONLY BECAUSE OF THE INSISTENT PRESSURES OF BLACK PEOPLE AND THEIR ALLIES, AND ONLY BECAUSE SUFFICIENT PRESSURE WAS BROUGHT TO ENACT LAWS AND COMPLIANCE MECHANISMS MANDATING BLACK PARTICIPATION IN AMERICAN INSTIUTIONAL LIFE.

NO ONE SHOULD DELUDE HIMSELF INTO THINKING THOSE LAWS WERE NOT NECESSARY. FOR ALL THE TALK ABOUT "QUOTAS," BLACK PEOPLE HAVE BEEN VICTIMIZED BY NEGATIVE QUOTAS THROUGHOUT OUR HISTORY. AND EVEN WHEN THE BARRIERS OF OUTRIGHT DISCRIMINATION AGAINST BLACKS WERE LIFTED, THEY WERE OFTEN MERELY REPLACED BY SUBTLE, SUPPOSEDLY NEUTRAL BARRIERS.

THAT HELPS EXPLAIN WHY WE HAVE ABSOLUTELY NO FAITH AT ALL IN THE SO-CALLED MERIT SYSTEM. THE MERIT SYSTEM WAS INVOKED TO KEEP BLACKS OUT, ON THE BASIS OF TEST SCORES AND GRADE AVERAGES. BUT THE COLLEGIATE MERIT SYSTEM ALWAYS SEEMED TO FIND ROOM FOR C STUDENTS WHO COULD CATCH A FOOTBALL OR HAVE THE GOOD SENSE TO BE BORN INTO THE FAMILY OF A WEALTHY ALUMNUS. THE FEDERAL CIVIL SERVICE, SUPPOSEDLY A MODEL OF "MERIT" INCLUDES PROVISIONS FOR A DISCRIMINATORY LIFETIME VETERANS PREFERENCE. A CONGRESS OBSESSED WITH ATTACKING AFFIRMATIVE ACTION FOR MINORITIES HAS RECENTLY RENEWED THE VETERANS PREFERENCE.

BUT THE PLAIN FACT IS THAT EVEN A MERIT SYSTEM BASED SOLELY ON TEST SCORES IS INADEQUATE AS A SELECTION MECHANISM. TESTS HAVE NOT BEEN DEVISED THAT CAN ACCURATELY PREDICT FUTURE SUCCESS. THEY ARE A MECHANICAL RESPONSE TO A PROBLEM THAT BREEDS PROBLEMS OF ITS OWN.

OUR SOCIETY SIMPLY DOES NOT AFFORD ENOUGH OF ITS CITIZENS OPPORTUNITIES TO GET A JOB OR AN EDUCATION, AND TESTS ARE THE MEANS BY WHICH IT EXCLUDES ITS SURPLUS PEOPLE — MOST OFTEN THOSE WHO ARE BLACK AND POOR. MEDICAL SCHOOL AND LAW SCHOOL APTITUDE TESTS CAN'T PREDICT WHICH STUDENTS WILL MAKE GOOD DOCTORS OR LAWYERS. AND INCREASINGLY, JOB TESTS MEASURE CONFORMITY RATHER THAN SKILLS.

A FEDERAL JUDGE IN BRIDGEPORT RECENTLY THREW OUT THAT CITY'S TESTS FOR FIREMEN. WHY? LET ME READ YOU SOME QUESTIONS ON THE TEST:

"LABEL THE FOLLOWING PROPOSITIONS TRUE OR FALSE:

"PHILOSOPHICAL QUESTIONS ARE A WASTE OF TIME."

"I CAN'T SEE HOW INTELLECTUALS GET PERSONAL SATISFACTION FROM THEIR IMPRACTICAL LIVES."

"WHEN I WAS A CHILD, I SHOWED NO INTEREST IN BOOKS."

A "TRUE" ANSWER ON ALL OF THOSE WAS MARKED CORRECT.

NOW WHAT DOES THAT HAVE TO DO WITH FIREFIGHTING? TESTS LIKE THAT MEASURE CONFORMITY TO VALUES THAT MAY IN THEMSELVES BE ANTI-SOCIAL.

THE BRIDGEPORT TEST MAY BE AN EXTREME INSTANCE, ESPECIALLY WHEN MEASURED AGAINST VARIOUS ENTRANCE EXAMS FOR COLLEGES AND UNIVERSITIES, BUT THE BARE TRUTH IS THAT TESTS ARE DEFECTIVE MEASURING INSTRUMENTS OF POTENTIAL.

THEIR FLAWS ARE SUCH THAT WE CAN SAFELY SAY THAT A "MERIT SYSTEM" IS A DISTANT DREAM, IF INDEED, IT IS POSSIBLE AT ALL. EVEN THE MOST CAREFULLY DESIGNED TEST WILL TIP THE SCALES IN FAVOR OF THE CHILDREN OF AFFLUENT FAMILIES TO THE DETRIMENT OF MINORITY YOUNGSTERS WHO HAD TO OVERCOME INCREDIBLE OBSTACLES JUST TO GET TO THE POINT WHERE THEY COULD TAKE AN ENTRANCE EXAM.

THE RATIONALE FOR AFFIRMATIVE ACTION WAS BEST STATED BY THE LATE PRESIDENT LYNDON JOHNSON, WHEN HE SAID:

"TO BE BLACK IN A WHITE SOCIETY IS NOT TO STAND ON LEVEL AND EQUAL GROUND. WHILE THE RACES MAY STAND SIDE BY SIDE, WHITES STAND ON HISTORY'S MOUNTAIN AND BLACKS STAND IN HISTORY'S HOLLOW. UNTIL WE OVERCOME UNEQUAL HISTORY, WE CANNOT OVERCOME UNEQUAL OPPORTUNITY."

AND JOHNSON CONCLUDED BY SAYING "IT'S TIME WE GET DOWN TO THE BUSINESS OF TRYING TO STAND BLACK AND WHITE ON LEVEL GROUND. IN SPECIFIC AREAS WE MUST SET NEW GOALS, NEW OBJECTIVES AND NEW STANDARDS."

AFFIRMATIVE ACTION IS THE NAME WE GIVE TO THE ATTEMPT TO HELP BLACK PEOPLE OUT OF "HISTORY'S HOLLOW." IT'S FUTURE — AND THE FUTURE OF BLACK HOPES — RESTS UPON THE DETERMINATION OF AMERICA'S EDUCATIONAL ESTABLISHMENT TO PRESS FORWARD WITH EFFECTIVE AFFIRMATIVE ACTION PLANS.

HAROLD HOWE HAS POINTED OUT: "THE BAKKE DECISION OF THE SUPREME COURT DOESN'T REQUIRE AFFIRMATIVE ACTION IN ADMISSIONS PROGRAMS — IT MERELY ALLOWS IT."

AND HE GOES ON TO CORRECTLY IDENTIFY THE CRUX OF THE PROBLEM WE FACE TODAY: "THE COURT'S SUPPORT FOR THE USE OF RACE AS A PERMISSIBLE CRITERIA IN UNIVERSITY ADMISSIONS IS NO GUARANTEE TO MINORITY PERSONS THAT THEY WILL RECEIVE SPECIAL CONSIDERATION IN COMPETITION WITH WHITES."

SINCE THE BAKKE DECISION WAS HANDED DOWN ON WHAT SOME CALL "WHITE WEDNESDAY," WE HAVE BEEN GETTING CONFLICTING SIGNALS FROM EDUCATIONAL LEADERS. SOME SAY THE DECISION WILL RESULT IN NO CHANGE IN THEIR AFFIRMATIVE ACTION PROGRAMS, OTHERS SAY THEY'LL HAVE TO TAKE A CLOSER LOOK AT THEIR PROGRAMS IN THE LIGHT OF JUSTICE POWELL'S PECULIAR SENSITIVITIES.

IN EFFECT, THEY'VE BEEN SAYING "TRUST US." BUT I SEE NOTHING IN THE TRACK RECORD OF THE EDUCATIONAL ESTABLISHMENT, NOR IN THEIR TARDY AND RELATIVELY COMPLACENT ATTITUDE TOWARD MINORITY INCLUSION, TO ENCOURAGE SUCH TRUST.

EVEN BEFORE THE BAKKE DECISION, THE PACE OF AFFIRMATIVE ACTION WAS SLOWING. THE 1977-78 ENTERING CLASS OF MEDICAL SCHOOLS, FOR EXAMPLE, HAD FEWER BLACKS THAN DID THE 1974-75 CLASS, ALTHOUGH THERE WERE SOME ADDITIONAL 1,400 OPENINGS.

SO TRUST MUST BE EARNED. AND TRUST, IN THE POST-BAKKE ERA, MEANS THAT THE EDUCATIONAL ESTABLISHMENT MUST INTERPRET THAT DECISION AS A GREEN LIGHT TO GO AHEAD WITH VIGOROUS AFFIRMATIVE ACTION PLANS.

RESPONSIBILITY IS NOT DISCHARGED BY TAKING THE ROUTE OF LEAST RESISTANCE, BY TREADING A PATH OF CAUTION THAT ULTIMATELY NEGATES THE STATED OBJECTIVES OF PROVIDING EXPANDED OPPORTUNITIES FOR MINORITIES.

THE CHILLING EFFECT THAT THREATENS TO BE THE FINAL RESULT OF BAKKE LIES IN THE FEAR OF LAWSUITS, IN THE EXCESSIVE CAUTION OF LEGAL COUNSELORS AND ADMINISTRATORS, AND IN THE TEMPTATION TO ACCEPT MINIMUM, RATHER THAN MAXIMUM, NUMBERS OF MINORITIES.

JOHN F. KENNEDY SAID "RESPONSIBILITY IS NOT DISCHARGED BY THE ANNOUNCEMENT OF VIRTUOUS ENDS." IT'S NOT ENOUGH TO ADOPT NEUTRAL ADMISSIONS POLICIES AND TO DO THE MINIMUM ALLOWABLE UNDER THE NARROWEST POSSIBLE INTERPRETATION OF THE BAKKE DECISION.

IT IS NOT ENOUGH TO MISTAKE RINGING DECLARATIONS FOR ACTION. WORDS, HOWEVER HIGH-SOUNDING, CAN'T SUBSTITUTE FOR AFFIRMATIVE ACTION PROGRAMS THAT PROVIDE LONG OVERDUE OPPORTUNITIES TO BLACKS AND OTHER MINORITIES.

THE REAL QUESTION FACING EDUCATIONAL ADMINISTRATORS IN THE POST-BAKKE ERA IS WHETHER THEY WILL CHOOSE HYPOCRISY OR EFFECTIVE ACTION. THE BAKKE CASE CLARIFIED SOME ISSUES AND MUDDIED OTHERS. IT CAN BE A MINOR INCIDENT IN THE HISTORY OF BLACK PROGRESS OR IT CAN BECOME A MAJOR SETBACK.

BLACK PEOPLE ARE THUS CHALLENGED TO ESCALATE THEIR PRESSURE ON EDUCATIONAL INSTITUTIONS. THE MAJOR TASK FOR THE BLACK COMMUNITY IN THE COMING MONTHS LIES IN MONITORING AFFIRMATIVE ACTION PROGRAMS AND TAKING IMMEDIATE ACTION WHEN THERE ARE SIGNS OF SAIL-TRIMMING.

AND AMERICA'S COLLEGES AND UNIVERSITIES ARE CHALLENGED TOO. THEY ARE CHALLENGED TO OVERCOME THE PERVASIVE DISCRIMINATION OF THE PAST AND THE DISCRIMINATORY EFFECTS OF SO-CALLED NEUTRAL ADMISSIONS MECHANISMS OF THE PRESENT. THEY ARE CHALLENGED TO DEVISE CONSTITUTIONALLY ACCEPTABLE AFFIRMATIVE ACTION PROGRAMS THAT MEET NOT ONLY THE LIMITS OF JUSTICE POWELL'S OPINION, BUT THE SPIRIT OF A DECISION THAT AFFIRMS RACE-CONSCIOUSNESS AS A LEGITIMATE AND CONSTITUTIONAL FACTOR IN AN ADMISSIONS PROGRAM.

AT STAKE IS THE FUTURE OF BLACK EDUCATIONAL OPPORTUNITY.

AT STAKE IS THE MORAL INTEGRITY OF AMERICA'S INSTITUTIONS OF HIGHER EDUCATION.